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(Slip Opinion)

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**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

_____)	
In the Matter of:)	
)	PSD Appeal Nos. 93-11
SEI Birchwood, Inc.)	& 93-12
_____)	

[Decided January 27, 1994]

ORDER DENYING REVIEW

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

SEI BIRCHWOOD, INC.

PSD Appeal Nos. 93-11 & 93-12

ORDER DENYING REVIEW

Decided January 27, 1994

Syllabus

This action involves two petitions for review of a Prevention of Significant Deterioration (PSD) permit issued by the State of Virginia under a delegation from the U.S. EPA. The petitions relate to a permit issued to SEI Birchwood (SEI) for the construction of a 220-megawatt coal-fired electric generating facility in King George County, Virginia. The first petition was filed by Sarah Nasta. Ms. Nasta expresses concern over the impact of the facility on historical structures, the need for a study of the cumulative impact of the proposed facility, and the impact of the facility on the Chesapeake Bay and the Rappahannock River.

The second petition was filed by Citizens for Sensible Power (CSP). CSP raises a total of seven objections to the PSD permit. These can be summarized as follows: 1) the citizens of King George County were not given sufficient notice of the public hearing on the present permit; 2) the National Park Service determined that the plant would adversely impact Shenandoah National Park; 3) the State ignored obvious and calculable impacts on the Chesapeake Bay; 4) the proposed facility is unnecessary; 5) the State and Virginia Power are not doing enough to promote energy efficiency and conservation; 6) the proposed facility does not reflect Best Available Control Technology; and 7) the Agency should consider the cumulative impact of this and other power plants in Virginia.

Held: Review of the petitions is denied. The petition filed by Sarah Nasta merely restates issues raised and addressed during the public comment period without explaining why the State's responses to these comments were clearly erroneous or otherwise warrant review. In addition, the concerns raised by Ms. Nasta are not stated with sufficient specificity to satisfy the requirements of 40 C.F.R. §124.19, nor does the petition identify the specific permit conditions being challenged.

The petition filed by CSP fails to identify any factual or legal errors or any policy considerations or exercises of discretion that warrant review. Moreover, several of CSP's objections either restate issues raised during the comment period without indicating why the State's response were clearly erroneous, raise issues outside the scope of the Board's jurisdiction, or raise issues that were not raised during the comment period.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge McCallum:

I. BACKGROUND

The Environmental Appeals Board has received two petitions for review of a Prevention of Significant Deterioration (PSD) permit issued to SEI Birchwood, Inc. (SEI) for construction of a 220-megawatt coal-fired electric generating facility in King George County, Virginia. PSD Appeal No. 93-11 was filed by Sarah Nasta, a member of "Citizens opposed to the SEI Birchwood power plant." PSD Appeal No. 93-12 was filed by Citizens for Sensible Power (CSP) representing concerned citizens in King George, Spotsylvania, Caroline, and Stafford Counties, as well as Fredericksburg, Virginia. Both petitioners filed comments on the draft permit during the public comment period.

The permit was issued by the Virginia Department of Environmental Quality (VDEQ) pursuant to a delegation of authority from U.S. EPA, Region III, under 40 C.F.R. §52.21(u). Because of this delegation, the Virginia permit is considered an EPA-issued permit for purposes of federal law (40 C.F.R. §124.41; 45 Fed. Reg. 33,413 (May 19, 1980)), and is subject to review by the Agency under 40 C.F.R. §124.19 before becoming final. As requested by the Board, the VDEQ filed a response to the petitions. Although not requested to do so, SEI has also filed a brief responding to the two petitions for review.

II. DISCUSSION

Under the rules governing this proceeding, a petition for review will not ordinarily be granted unless the permit determination is clearly erroneous or involves an important matter of policy or exercise of discretion that warrants review. 40 C.F.R. §124.19. As the preamble to the Part 124 regulations states: "[the] power of review should be only sparingly exercised" and "most permit conditions should be finally determined at the Regional [or State] level." 45 Fed. Reg. 33,412 (May 19, 1980). The burden of demonstrating that review is warranted rests on the petitioner. *In re Crown/Vista Energy Project (CVEP) West Deptford, New Jersey*, PSD Appeal Nos. 93-15, *et al.*, at 3 (EAB, January 5, 1994); *In re Genesee Power Station*, PSD Appeal Nos. 93-1 through 93-7, at 5-6 (EAB, October 22, 1993). In the present case, the petitioners have failed to satisfy their burden with regard to any of the issues raised.

A. *Petition of Sarah Nasta*

In a two-page letter addressed to the Environmental Appeals Board, Ms. Nasta states that she is appealing VDEQ's decision to grant a PSD permit to SEI Birchwood. Ms. Nasta expresses concern over the impact of the facility on historical structures, the need for a study of the cumulative impact of the proposed facility, and the impact of the facility on the Chesapeake Bay and the Rappahannock River.

The petition, however, merely restates comments previously submitted to the State during the comment period without indicating why the State's responses to these comments were clearly erroneous or otherwise warrant review. The

petition therefore fails to convince us that review is warranted.¹ *Crown/Vista, supra*, at 4; *In re Hadson Power 14 - Buena Vista*, PSD Appeal Nos. 93-2, *et al.*, at 36-37 (EAB, Oct. 5, 1992) (mere reference to comments on a draft permit is insufficient to justify review). In addition, the issues raised by Ms. Nasta are not stated with sufficient specificity to satisfy the requirements of §124.19, nor does the petition identify the specific permit conditions being challenged. Accordingly, review is denied. *Genesee, supra*, at 41 & 42; *see also In re Beckman Production Services*, UIC Appeal Nos. 92-9, *et al.*, at 11 (EAB, January 24, 1994) (although the Board does not expect that petitions filed by persons unrepresented by counsel will necessarily conform to "exacting and technical pleading requirements, a petitioner must nevertheless comply with the minimal pleading standards and articulate *some* supportable reason why the [permitting authority] erred in its permit decision in order for the petitioner's concerns to be meaningfully addressed by the Board.") (emphasis in original).

B. Petition of Citizens for Sensible Power

The Petition filed on behalf of Citizens for Sensible Power (CSP)² raises a total of 7 objections to the SEI permit. These will be discussed below, *seriatim*.

First, CSP contends that the citizens of King George County were not given sufficient notice of the public hearing on the present permit because such notice was not provided at least 30-days prior to the hearing. *See* 40 C.F.R. §124.10(b)(2) (public notice of a public hearing shall be given at least 30 days before the hearing). We disagree. Contrary to CSP's assertion, the record on appeal indicates that the public was indeed provided with 30-days notice of the public hearing. Such notice was published in the *Free Lance Star*, a daily newspaper with general circulation in the Fredericksburg area, including King George County, on December 5, 1992, 30-days prior to the January 5, 1993 public hearing.³ *See* Attachment 1a to VDEQ's Response to CSP's Petition for Review. Review is therefore denied on this basis.

¹ Ms. Nasta also states that the power from the proposed facility is not needed. This issue, however, is outside the scope of the Board's jurisdiction and does not, therefore, warrant review. *See In re Kentucky Utilities Company*, PSD Appeal No. 82-5, at 2 (Adm'r, Dec. 21, 1982) (holding that the need for a power plant is "more appropriately addressed by the state agency charged with making that determination.").

² The petition was submitted by Conway C. Moy and Joyce C. Childress.

³ This notice satisfied the requirements of 40 C.F.R. §124.10(c)(2)(i) (notice must be published in a daily or weekly newspaper within the area affected by the facility).

Second, CSP states that the National Park Service has determined that the plant would adversely impact Shenandoah National Park. While it is true that the Federal Land Manager for Shenandoah National Park initially indicated that the proposed facility would have an adverse impact on visibility and other air quality related values at the Park,⁴ this finding was later withdrawn. By letter dated August 13, 1993, the Department of the Interior indicated that, after receiving and reviewing the results of additional modelling conducted by SEI, it was withdrawing its adverse impact finding for the SEI Birchwood project.⁵ We therefore see no reason to grant review on this basis.

Third, CSP states that SEI and VDEQ ignored impacts on the Chesapeake Bay. CSP does not specify exactly what impacts were ignored, or why the modelling conducted for the proposed facility was incomplete. The objection is therefore not stated with sufficient specificity to justify review.⁶ *See Genesee, supra*, at 41-42.

CSP's fourth and fifth objections -- that the energy provided by the proposed facility is unneeded and that the State and Virginia Power are not doing enough to promote energy conservation -- are outside the scope of the Board's jurisdiction and do not warrant review. *See supra* note 1.

Next, CSP contends that emissions limitations from the proposed facility will not meet the definition of Best Available Control Technology or BACT.⁷

⁴ Letter from Jennifer Salisbury, Assistant Secretary for Fish and Wildlife and Parks, United States Department of the Interior, to Wallace Davis, Executive Director, Virginia Department of Air Pollution Control (January 8, 1993) (Attachment 1d to VDEQ's Response).

⁵ Letter from Don Barry, Acting Assistant Secretary for Fish and Wildlife and Parks, United States Department of Interior, to Pam Faggert, Executive Director, VDEQ (August 13, 1993) (Attachment 1e to VDEQ's Response).

⁶ In its response to comments on the draft permit, VDEQ addresses concerns regarding the impact of the proposed facility on the Chesapeake Bay. *See* Response to Comments, at 21-23. CSP fails to indicate why the State's responses in this regard were clearly erroneous or otherwise warrant review. *See Crown/Vista, supra*, at 4.

⁷ "Best Available Control Technology" is defined in pertinent part in the Clean Air Act as:

an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under [the Act] emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques

(continued...)

CSP's sole support for this assertion is the following statement: "At long last, Virginia regulators continue to demonstrate that only the U.S. EPA can lead Virginia to require basic energy efficiency and natural gas as economic alternatives for [BACT]." Petition for Review at 3. However, because the issue as framed by CSP was reasonably ascertainable but was not raised during the public comment period, review is denied. 40 C.F.R. §124.13 (all persons have an obligation to raise "all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period."). Moreover, the above-quoted objection, which evidently is intended to express petitioner's preference for a different type of electric generating facility than proposed by the permit applicant, fails to satisfy petitioner's burden of demonstrating clear error on the part of the permitting authority.⁸

Finally, CSP argues that the Agency should require the preparation of a cumulative environmental impact statement for this and other previously permitted sources in Virginia. This argument, however, merely restates objections previously raised during the public comment period and addressed in various sections of the State's responses to comments.⁹ The petition does not, however, indicate why these responses are clearly erroneous or otherwise warrant review. Moreover, the

⁷(...continued)
for control of each such pollutant.

42 U.S.C. §7479(3); *see also*, 40 C.F.R. §52.21(b)(12) (definition of BACT).

⁸ It is clear that permits issued by delegated States under federal PSD permitting regulations are not subject to challenge because the permit-issuer refused to redefine the source. Thus, in *In re Pennsauken County, New Jersey Resource Recovery Facility*, PSD Appeal No. 88-8, at 11 (Adm'r, Nov. 10, 1988), involving a permit issued under federal PSD permitting regulations by the State of New Jersey (pursuant to a delegation of authority from EPA Region II), the Administrator of EPA held that "the conditions themselves [of such a PSD permit] are not intended to redefine the source * * *." He therefore rejected a challenge to the permit that would have required a fundamental redesign of the proposed facility. Similarly, in *In re Old Dominion Electric Cooperative*, PSD Appeal No. 91-39 (Adm'r, Jan. 29, 1992), involving a permit issued under federal PSD permitting regulations by the Commonwealth of Virginia (pursuant to a delegation of authority from EPA Region III), the Administrator found no clear error in the State's rejection of a challenger's proposal to substitute one type of electric generating facility (fired by natural gas) for another (coal-fired) on the grounds that such an alternative would redefine the source. More recently, this Board has held that "EPA's PSD permit conditions regulations do not mandate that the permitting authority redefine the source in order to reduce emissions." *In re Hawaiian Commercial & Sugar Company*, PSD Appeal No. 92-1, at 6 (EAB, July 20, 1992) (involving a permit issued under federal PSD permitting regulations by the State of Hawaii pursuant to a delegation of authority from EPA Region IX).

⁹ *See, e.g.*, Response to Comments, at 2, 3 ("It has been the consistent policy of the VDEQ to require analysis of the cumulative impact due to appropriate Class I increment-consuming sources within 100 km of either of the two Class I areas in Virginia."); ("The permit applicant was required by the VDEQ to perform an analysis of cumulative impacts upon the [Shenandoah National Park].").

record on appeal indicates that SEI conducted all required analyses and demonstrated that the proposed facility would not cause or contribute to violations of any national ambient air quality standard or allowable PSD increments. Review is therefore denied on this basis.

III. *CONCLUSION*

For all the foregoing reasons, review of each of the petitions for review is denied.

So ordered.